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47 **JOINT OMNIBUS REPLY TO OPPOSITIONS FILED AGAINST JOINT MOTION OF
48 OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA CAPITAL
49 FIRST TRUST DEED FUND, LLC, THE OFFICIAL COMMITTEE OF HOLDERS OF
50 EXECUTORY CONTRACT RIGHTS THROUGH USA COMMERCIAL MORTGAGE
51 COMPANY, THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF
52 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, AND THE OFFICIAL
53 UNSECURED CREDITORS' COMMITTEE FOR USA COMMERCIAL MORTGAGE
54 COMPANY PURSUANT TO 11 U.S.C. §§ 105(a), 107(b), 1102(b)(3)(A) AND 1103(c), FOR
55 NUNC PRO TUNC ORDER CLARIFYING REQUIREMENT TO PROVIDE ACCESS
56 TO INFORMATION (AFFECTS ALL DEBTORS)**

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re: USA COMMERCIAL MORTGAGE COMPANY, Debtor.)	BK-S-06-10725-LBR Chapter 11
In re: USA CAPITAL REALTY ADVISORS, LLC, Debtor.)	BK-S-06-10726-LBR Chapter 11
In re: USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, Debtor.)	BK-S-06-10727-LBR Chapter 11
In re: USA CAPITAL FIRST TRUST DEED FUND, LLC, Debtor.)	BK-S-06-10728-LBR Chapter 11
In re: USA SECURITIES, LLC, Debtor.)	BK-S-06-10729-LBR Chapter 11

**JOINT OMNIBUS REPLY TO OPPOSITIONS FILED AGAINST JOINT MOTION OF
OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA CAPITAL
FIRST TRUST DEED FUND, LLC, THE OFFICIAL COMMITTEE OF HOLDERS OF
EXECUTORY CONTRACT RIGHTS THROUGH USA COMMERCIAL MORTGAGE
COMPANY, THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF
USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, AND THE OFFICIAL
UNSECURED CREDITORS' COMMITTEE FOR USA COMMERCIAL MORTGAGE
COMPANY PURSUANT TO 11 U.S.C. §§ 105(a), 107(b), 1102(b)(3)(A) AND 1103(c), FOR
NUNC PRO TUNC ORDER CLARIFYING REQUIREMENT TO PROVIDE ACCESS
TO INFORMATION (AFFECTS ALL DEBTORS)**

TO THE HONORABLE LINDA B. RIEGLE, UNITED STATES BANKRUPTCY JUDGE:

The Official Committee of Equity Security Holders of USA Capital First Trust Deed Fund, LLC (the "First Trust Deed Committee"), the Official Committee of Holders of Executory Contract Rights through USA Commercial Mortgage Company (the "Direct Lender Committee"); the Official Committee of Equity Security Holders of USA Capital Diversified Trust Deed Fund, LLC (the "Diversified Trust Deed Committee"); and the Official Unsecured

1 Creditors' Committee for USA Commercial Mortgage Company (the "Unsecured Creditors'
 2 Committee" and together with the First Trust Deed Committee, the Direct Lender Committee,
 3 and the Diversified Trust Deed Committee, the "Committees") appointed in the above-captioned
 4 bankruptcy cases (the "Chapter 11 Cases"), hereby jointly reply (the "Reply") to the two
 5 responses and two oppositions (collectively, the "Responses") filed with regard to the "Joint
 6 Motion Of Official Committee Of Equity Security Holders Of USA Capital First Trust Deed
 7 Fund, LLC, The Official Committee Of Holders Of Executory Contract Rights Through USA
 8 Commercial Mortgage Company, The Official Committee Of Equity Security Holders Of USA
 9 Capital Diversified Trust Deed Fund, LLC, And The Official Unsecured Creditors' Committee
 10 For USA Commercial Mortgage Company Pursuant To 11 U.S.C. §§ 105(a), 107(b),
 11 1102(b)(3)(A) And 1103(c), For Nunc Pro Tunc Order Clarifying Requirement To Provide
 12 Access To Information" (the "Joint Motion"),¹ which are listed below:

13

14 (1) The United States Trustee's Limited Opposition To
 15 Committees' Joint Motion Pursuant To 11 U.S.C. §§ 105(a),
 16 107(b), 1102(b)(3)(A) and 1103(c) for Nunc Pro Tun Order
 Clarifying Requirement to Provide Access to Information (the
 "UST Opposition") [docket # 613];

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18 (2) Debtors' Response to Joint Motion of Committees Pursuant to
 19 11 U.S.C. §§ 105(a), 107(b), 1102(b)(3)(A) and 1103(c) for Nunc
 Pro Tun Order Clarifying Requirement to Provide Access to
 Information (the "Debtors' Response") [docket # 615];

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21 (3) Opposition to Joint Motion For Nunc Pro Tunc Order
 Clarifying Requirements to Provide Access to Information (the
 "McKnight Opposition") [docket # 614]; and

22

23 (4) Debtors' Supplemental Response to Joint Motion of
 24 Committees Pursuant to 11 U.S.C. §§ 105(a), 107(b),
 1102(b)(3)(A) and 1103(c) for Nunc Pro Tun Order Clarifying
 Requirement to Provide Access to Information (the "Debtors'
 Supplemental Response") [docket # 643].

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28 ¹ Any terms not defined herein shall have the same meanings ascribed to them in the Joint
 Motion.

II. FACTS

1. On June 7, 2006, the Committees filed the Joint Motion, pursuant to which the Committees requested entry of an order (i) clarifying and providing that the Committees are not authorized or required, pursuant to newly enacted section 1102(b)(3)(A) of the Bankruptcy Code, to provide access to confidential and other non-public proprietary information, or to privileged information, to their respective constituencies; and (ii) establishing certain procedures (the "Information Protocol") by which the Committees may provide information to and solicit and receive comments from their respective constituencies and thereby satisfy their duty under section 1102(b)(3) of the Bankruptcy Code.

2. On June 12, 2006, the UST Opposition, the Debtors' Response, and the McKnight Opposition were timely filed.

3. On June 14, 2006, two days after the opposition deadline and just hours before the Committees' reply deadline, the Debtors filed the Debtors' Supplemental Response.

II. REPLY TO THE UST OPPOSITION.

4. The United States Trustee (the "UST") opposed the Joint Motion on the limited basis that the proposed exculpation language contained therein is "overly broad." UST Opposition, ¶ 2. In the UST Opposition, the UST requests that any order approving the Joint Motion should expressly limit the exculpation of the Information Protocol by including language similar to the language in the order annexed to the bankruptcy court's opinion in In re Refco, Inc., 336 B.R. 187, 195 (Bankr. S.D.N.Y. 2005).

5. The Committees have no objection to including the language used in the Refco order in the Information Protocol's exculpation clause. As such, the Committees propose that the exculpation clause of the Information Protocol now provide (with added language emphasized):

Exculpation: None of the Debtors, the Committees or any of their respective directors, officers, employees, members, attorneys, consultants, advisors, and agents (acting in such capacity) (collectively, the "Exculpated Parties") shall have or incur any liability to any entity (including the Debtors) for any act taken or omitted to be taken connection with the preparation, dissemination, or implementation of the Information Protocol, the Committee

1 Websites, and other information to be provided pursuant to section
 2 1102(b)(3) of the Bankruptcy Code; provided, however, that the
 3 foregoing shall not affect the liability of any Exculpated Party
 4 protected pursuant to this paragraph 11 that otherwise would result
 5 from any such act or omission to the extent that such act or
 6 omission is determined in a final non-appealable order to have
 7 constituted a breach of fiduciary duty, gross negligence, or willful
misconduct, including, without limitation, fraud and criminal
misconduct, or the breach of any confidentiality agreement or
Order. Without limiting the foregoing, the exculpation provided in
 this paragraph shall be coextensive with any Exculpated Party's
 qualified immunity under applicable law.

8

9 **III. REPLY TO THE DEBTORS' RESPONSE.**

10 6. The Debtors' Response pertains to all of the Committees only insofar as
 11 the Debtors assert that Confidential Information and/or Privileged Information should only be
 12 provided to a constituent of a Committee if such constituent agrees to enter into a confidentiality
 13 agreement relating to that information and further agrees to take any other necessary action to
 14 protect the confidentiality of the information that the constituent receives.

15 7. The purpose of the relief requested in the Joint Motion is to clarify that the
 16 Committees are not required to provide Confidential Information or Privileged Information to the
 17 Committees' respective constituents to fulfill their duties under 11 U.S.C. § 1102(b)(3) and,
 18 furthermore, to establish procedures by which the Committees may communicate with their
 19 respective constituents in meeting their statutory obligations. The Committees believe that
 20 section "c" of the Information Protocol already addresses the issue raised by the Debtors about
 21 Confidential Information and Privileged Information. However, the Committees have no
 22 objection to amending the Information Protocol to explicitly provide that Confidential
 23 Information and/or Privileged Information that is protected under a confidentiality agreement or
 24 protective order may only be provided to a constituent of a Committee if such constituent agrees
 25 to enter into a confidentiality agreement relating to that information and further agrees to take
 26 any other necessary action to protect the confidentiality of the information the constituent
 27 receives.

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IV. REPLY TO THE MCKNIGHT OPPOSITION.

8. The McKnight Opposition asks three questions that the Committees will

1 address in turn.

2 9. First, the McKnight Opposition questions whether the Joint Motion seeks
 3 "to restrict the rights of creditor's [sic] to conduct 2004 examinations of officer's [sic] and
 4 employees of the Debtors or fact witnesses with information relevant to the bankruptcy or
 5 otherwise inhibit the discovery rules applicable in an adversary proceeding." The Committees
 6 believe that nothing in either the Joint Motion or the Information Protocol impinges on or is
 7 intended to impinge on the right of any party in interest to conduct an examination pursuant to
 8 Rule 2004 of the Federal Rules of Bankruptcy Procedure or to lawfully pursue discovery in an
 9 adversary proceeding.

10 10. Second, the McKnight Opposition asks whether "the Information Protocol
 11 serve[s] to actually vitiate the statutory requirements under 11 U.S.C. § 1103(2) [sic] that the
 12 committees actually provide access to information and 'be subject to a court order that compels
 13 any additional report or disclosure to be made to the creditors.'" Nothing in the Joint Motion or
 14 the Information Protocol seeks to usurp this Court's authority to compel disclosure of
 15 information pursuant to 11 U.S.C. § 1102(b)(3)(C) or any statute or rule. Indeed, the
 16 Information Protocol states that a Committee is not required to provide Confidential Information
 17 and Privileged Information to a constituent of such Committee "without further order of the
 18 Court." Joint Motion, ¶ 33b. Moreover, the Information Protocol explicitly provides that if a
 19 dispute arises in connection with a Committee Response to a constituent's Information Request
 20 and the parties cannot reach a consensual resolution of the issue, the requesting constituent may
 21 file a motion to compel the disclosure of the requested information for cause.

22 11. The McKnight Opposition also asks, "What limitations exist on the
 23 committees [sic] ability to enter into confidentiality agreements that may hide important
 24 information concerning the claims that the Debtor [sic] may assert from public view?" In
 25 response, the Committees answer that question of what constitutes an appropriate confidentiality
 26 agreement is beyond the scope of either the Joint Motion or the Information Protocol.
 27 Furthermore, if a constituent, such as McKnight, wishes to obtain access to Confidential
 28 Information or Privileged Information, that constituent may attempt to enter into a confidentiality

1 agreement with the Debtors and, if such attempt fails, may move this Court for an order
 2 compelling disclosure of the requested information.

3 12. Finally, McKnight suggests that an order granting the Joint Information
 4 Motion nunc pro tunc would be inappropriate, though McKnight does not explain his reasoning.
 5 The Committees posit that a nunc pro tunc order is appropriate under the circumstances of these
 6 cases because the Committees have been receiving numerous requests for information since their
 7 formation and, as such, want to ensure that any actions they have taken since their inception that
 8 are consistent with the relief requested in the Joint Motion are ratified.

9 13. Accordingly, the McKnight Opposition should be overruled in its entirety.

10 **V. REPLY TO THE DEBTORS' SUPPLEMENTAL RESPONSE**

11 14. On the morning of June 14, 2006, the Debtors' filed the untimely Debtors'
 12 Supplemental Response.² The Debtors' Supplemental Response requests that the Joint Motion
 13 not be granted unless the Committees and the Debtors agree on a uniform definition of
 14 Confidential Information. While the Committees understand the Debtors' desire to have
 15 uniformity with respect to how Confidential Information is defined, protected, and disseminated,
 16 each Committee must fulfill its statutory duties under 11 U.S.C. § 1102(b)(3). None of the
 17 Committees should be precluded from fulfilling such statutory duties because one of the other
 18 Committees has a dispute with the Debtors. As such, the Committees request the Court overrule
 19 Debtors' Supplemental Response.

20 **WHEREFORE**, the Committees hereby request that the Court enter an order
 21 granting the Joint Motion as modified herein.

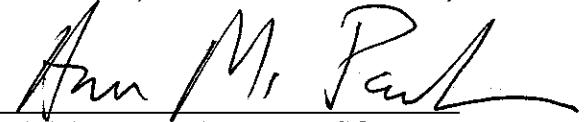
22
 23 Respectfully submitted this 14th day of June, 2006.

24
 25

26 2 The Committees request that the Court establish guidelines and/or procedures with respect to
 27 the filing of supplemental oppositions. As noted, the Debtors' Supplemental Response was
 28 filed several hours before the deadline for the Committees to file a reply, thereby prejudicing
 the Committees and making it extremely difficult for the Committees to provide the Court
 with an adequate response.

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